

ROBB EVANS
Receiver of
D.W. Heath & Associates, Inc.;
PCM Fixed Income Fund I, LLC;
Private Capital Management, Inc.;
Private Collateral Management, Inc.
and the Schlarmann Interests

11450 Sheldon Street
Sun Valley, California 91352-1121
Telephone No.: (818) 768-8100
Facsimile No.: (818) 768-8802

Securities and Exchange Commission v. D. W. Heath & Associates Inc., et al.
CASE No. CV-04-02949 JFW (Ex)

Notice of Motion and Motion by Receiver for Order:

- (1) Approving Final Report and Accounting;**
- (2) Approving Modified Treatment of Troxler Enterprises Claim;**
- (3) Approving Final Distribution of Receivership Assets;**
- (4) Approving Receiver's and Attorneys' Fees and Expenses from March 1, 2008 Through Closing;**
- (5) Discharging the Receiver;**
- (6) Relieving Receiver of All Duties and Liabilities;**
- (7) Exonerating Receiver's Bond; and**
- (8) Authorizing Abandonment and Destruction of Records and Wind-Up of Receivership Estate;**

Memorandum of Points and Authorities and Declaration of Gary Owen Caris in Support Thereof and Declaration of Robb Evans in Support of Motion

Filed July 1, 2009

1 GARY OWEN CARIS (SBN 088918)
gcaris@mckennalong.com
2 LESLEY ANNE HAWES (SBN 117101)
lhawes@mckennalong.com
3 MCKENNA LONG & ALDRIDGE LLP
4 444 South Flower Street, 8th Floor
Los Angeles, CA 90071-2901
5 Telephone: (213) 688-1000
Facsimile: (213) 243-6330

6 Attorneys for Permanent Receiver,
7 **ROBB EVANS**

8 **UNITED STATES DISTRICT COURT**

9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 v.

14 D.W. HEATH & ASSOCIATES, INC.,
etc., et al.,

15 Defendants.
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CASE NO. CV 04-02949 JFW (Ex)

**NOTICE OF MOTION AND MOTION
BY RECEIVER FOR ORDER (1)
APPROVING FINAL REPORT AND
ACCOUNTING; (2) APPROVING
MODIFIED TREATMENT OF
TROXLER ENTERPRISES CLAIM;
(3) APPROVING FINAL
DISTRIBUTION OF RECEIVERSHIP
ASSETS; (4) APPROVING
RECEIVER'S AND ATTORNEYS'
FEES AND EXPENSES FROM
MARCH 1, 2008 THROUGH
CLOSING; (5) DISCHARGING
RECEIVER; (6) RELIEVING
RECEIVER OF ALL DUTIES AND
LIABILITIES; (7) EXONERATING
RECEIVER'S BOND; (8)
AUTHORIZING ABANDONMENT
AND DESTRUCTION OF RECORDS
AND WIND-UP OF RECEIVERSHIP
ESTATE; MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATION OF GARY OWEN
CARIS**

Date: July 27, 2009
Time: 1:30 p.m.
Place: Courtroom 16
312 N. Spring Street
Los Angeles, CA

1 PLEASE TAKE NOTICE that on July 27, 2009, at 1:30 p.m., or as soon
2 thereafter as counsel may be heard in Courtroom 16 of the above-entitled court
3 located at 312 N. Spring Street, Los Angeles, California, Robb Evans, as permanent
4 receiver of D. W. Heath & Associates, Inc., Private Capital Management, Inc.
5 (“PCM”), Private Collateral Management, Inc. and PCM Fixed Income Fund I,
6 LLC and their subsidiaries and affiliates (collectively, the “Heath Receivership
7 Defendants”) and as Receiver over the Schlarmann Interests (“Receiver”), will
8 and does hereby move the Court for the following relief:

9 1. An order approving the Receiver’s Final Report and Accounting
10 attached to the Declaration of Robb Evans as Exhibit 1 (“Final Report”) filed
11 concurrently herewith;

12 2. An order approving a modified claim amount for the investor claim of
13 Troxler Enterprises, Inc./Rocco Troxler, reducing the claim from an allowed claim
14 of \$179,700 to a net claim of \$46,142.78 after taking into account an offsetting
15 claim of the Receiver against Troxler Enterprises, Inc. based on an outstanding,
16 unsatisfied loan made by Receivership Defendant PCM to Troxler Enterprises with
17 an unpaid principal balance of \$133,557.22 as of the date of commencement of the
18 receivership. The Receiver does not seek to offset against the Troxler claim any
19 accrued and unpaid interest, whether at the note rate or the legal rate, or any other
20 fees, costs or charges that may be due under the loan made by PCM to Troxler
21 Enterprises;

22 3. An order authorizing the Receiver to distribute pro rata, along with the
23 final distribution to holders of Allowed Investor Claims and Allowed Non-Investor
24 Claims, the proceeds of assets transferred to the Receiver from defendant Daniel
25 Heath (“forfeited assets”) in connection with the action entitled People of the State
26 of California v. Daniel William Heath, et al., Case No. RIF 117775 pending in the
27 Superior Court of California, County of Riverside (“Criminal Action”);
28

1 4. An order approving the Receiver's final distribution of all remaining
2 receivership assets, including the forfeited assets, to be distributed pro rata among
3 the holders of all Allowed Investor Claims and Allowed Non-Investor Claims after
4 payment or reserve for payment from such assets of all remaining administrative
5 expenses of the receivership as set forth in the Receiver's Final Report. In
6 connection therewith, and in the interests of completing the closing and wind up of
7 the estate expeditiously and cost-effectively, the Receiver proposes that (a) all
8 distribution checks issued on account of the final distribution to holders of Allowed
9 Investor Claims and Allowed Non-Investor Claims be required to be negotiated
10 within 60 days of the date of issuance ("stale date deadline") and that checks
11 returned without a valid forwarding address or checks uncashed after the stale date
12 deadline be deemed void, (b) the Receiver be authorized to turn over and escheat to
13 the State of California any distribution payments on Allowed Investor and Allowed
14 Non-Investor Claims that are uncashed after such stale date deadline, and (c) for the
15 32 investor claimants who to date have not cashed their distribution checks and
16 who the Receiver has been unable to locate, the Receiver be authorized to turn over
17 and escheat to the State of California those distributions, in an amount which to
18 date totals approximately \$51,000. As to distributions paid on Allowed Investor
19 and Non-Investor Claims to be escheated, the Receiver proposes to take the
20 necessary steps to escheat those funds to the State of California in the name of the
21 party to whom the distributions are due so that those persons, or potentially their
22 heirs or successors, may claim those funds in the future;

23 5. An order approving and confirming all actions and activities taken by
24 or on behalf of the Receiver and all payments made by the Receiver in connection
25 with the administration of the receivership estate;

26 6. An order approving all receivership administrative expenses, including
27 the Receiver's fees and expenses and those of his professionals incurred in
28 connection with the receivership proceeding, including those previously paid to the

1 Receiver and its counsel, and approving and authorizing payment of all
2 administrative expenses and Receiver's and professionals' fees and expenses
3 through the conclusion of this proceeding and the discharge of the Receiver, as
4 reflected in the Final Report, to the extent any such administrative expenses and
5 Receiver's and counsel's fees and expenses remain unpaid, including Receiver's
6 and counsel's fees and expenses incurred and unpaid from the period from March 1,
7 2008 through the closing of the estate. Further, the Receiver seeks an order that to
8 the extent there are any other miscellaneous funds remaining in the estate after
9 payment of all remaining administrative expenses and distributions, the Receiver be
10 authorized to turn over those funds to the Department of the Treasury;

11 7. An order authorizing the Receiver to abandon records of the Heath
12 Receivership Defendants and records pertaining to the Schlarmann Interests, and to
13 destroy all records of the Heath Receivership Defendants and the Schlarmann
14 Interests and any other corporations or businesses under the control of any of the
15 Heath Receivership Defendants and the Schlarmann Interests in the possession,
16 custody or control of the Receiver if, within 30 days after service of written notice
17 to plaintiff Securities and Exchange Commission, the Securities and Exchange
18 Commission does not take custody of such records;

19 8. An order discharging the Receiver, its agents, employees, members,
20 officers, independent contractors, attorneys and representatives and relieving the
21 Receiver, its agents, employees, members, officers, independent contractors,
22 attorneys and representatives of all duties, liabilities and responsibilities pertaining
23 to the receivership previously established in this action effective upon the
24 completion of the Receiver's wind up of the estate, payment of administrative
25 expenses and final distribution of funds as provided herein;

26 9. An order exonerating the Receiver's bond effective upon the
27 completion of the Receiver's wind up of the estate, payment of administrative
28 expenses and final distribution of funds as provided herein; and

1 10. An order for any other and further relief as may be reasonable or
2 appropriate in connection with the wind up and closure of the receivership estate.

3 PLEASE TAKE FURTHER NOTICE that this Motion is made pursuant
4 to Local Rules 66-7 and 66-8, and is based upon this notice of motion and motion,
5 the separate notice of hearing on the Motion served pursuant to the Court's prior
6 order limiting notice in the matter,¹ the accompanying memorandum of points and
7 authorities and declarations of Gary Owen Caris and Robb Evans in support hereof,
8 upon the pleadings, records and files of this Court in connection with this matter of
9 which the Receiver requests the Court take judicial notice, and upon such further
10 oral and documentary evidence and argument as may be presented at or before the
11 time of the hearing on the Motion.

12 PLEASE TAKE FURTHER NOTICE that the Motion is served in
13 accordance with the Limited Notice Order. Pursuant to the Limited Notice Order,
14 this Motion is posted on the Receiver's website at www.heath-receiver.com, where
15 it may be viewed in its entirety. Copies of this Motion will be provided to any
16 interested party upon receipt of a written request which may be sent to: Robb Evans

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26 ¹ Order: (1) Approving Receiver's Report for the Period July 12, 2004 through
27 December 31, 2004; (2) Approving Receiver's Proposed Claims Filing and
28 Allowance Procedures; and (3) Granting an Order Limiting Notice Under Local
Rule 66-7 in Connection with Administrative and Similar Motions Under Local
Rule 66-7 entered March 4, 2005.

1 & Associates LLC, 11450 Sheldon Street, Sun Valley, California 91352-1121,
2 facsimile number (818) 768-8802.

3

4 DATED: July 1, 2009

McKENNA LONG & ALDRIDGE LLP
GARY OWEN CARIS
LESLEY ANNE HAWES

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By: /s/ Gary Owen Caris

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GARY OWEN CARIS

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Attorneys for Permanent Receiver,
ROBB EVANS

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13 *Moore's Federal Practice*, § 66.06[4][a], p. 66-22 (Matthew
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2 Clark on Receivers, § 383.1 (3d ed. 1959) 18

1 **I. INTRODUCTION AND STATEMENT OF FACTS**

2 This action was filed by the Securities and Exchange Commission (“SEC”)
3 against the Receivership Defendants as well as Daniel William Heath and Denis
4 Timothy O’Brien on or about April 29, 2004. The Receiver is the permanent equity
5 receiver in this matter. The Receiver was initially appointed as temporary receiver
6 pursuant to this Court’s Stipulation and Order Appointing Robb Evans Temporary
7 Receiver entered May 4, 2004. Thereafter, the Receiver was appointed as
8 permanent receiver pursuant to the Stipulation and Order Appointing a Permanent
9 Receiver entered May 19, 2004.

10 On July 2, 2004, the Riverside County District Attorney initiated a criminal
11 action against Heath, O’Brien, Heath’s father, John William Heath, and Larre Jaye
12 Schlarman (“Schlarman”), in the action entitled People of the State of California
13 v. Daniel William Heath, et al., Case No. RIF 117775 pending in the Superior
14 Court of California, County of Riverside (“Criminal Action”). The claims asserted
15 in the Criminal Action are subject to the state “Aggravated White Collar Crime
16 Enhancement” provisions of the California Penal Code, pursuant to which the
17 District Attorneys’ office has sought and obtained a temporary restraining order
18 prohibiting the disposition or transfer of assets by any of the criminal defendants.
19 In addition, on July 21, 2004, the Riverside Superior Court issued its Order
20 Appointing Robb Evans as Receiver of the Schlarman Interests Pursuant to Penal
21 Code section 186.11 (“July 21 Receivership Order”). The July 21, 2004
22 Receivership Order was subsequently amended by order entered November 19,
23 2004 in the Criminal Action to expand the scope of assets subject to the
24 receivership to include certain real property containing avocado groves located in
25 Bonsall, California (“Amended Schlarman Order”). The July 21, 2004
26 Receivership Order and the Amended Schlarman Order are referred to collectively
27 herein as the “Schlarman Receivership Order.” Pursuant to the Schlarman
28 Receivership Order, the Receiver has been appointed Receiver over all of the

1 Quizno's Entities and the Hotel Entities, as those terms are defined in the
2 Schlarmann Receivership Order, and the Bonsall property.

3 Judgments have been entered against the Receivership Defendants as well
4 as against Heath in this civil action in the principal amount of \$109,334,158. The
5 Receiver's reports filed in this case set forth the Receiver's conclusions as to the
6 lack of financial basis for the transactions and investments solicited from the
7 victims of the investment fraud perpetrated by the defendants and further support
8 the conclusion that funds paid to earlier investors as "interest" or "profits" were
9 paid with funds from later investors.

10 Trial in the Criminal Action has also been completed, with all defendants
11 found guilty of numerous counts of fraud, elder abuse and other crimes. All
12 defendants have now been sentenced. In connection therewith, orders have been
13 entered in the Criminal Action by which various assets of defendants John Heath,
14 Denis O'Brien and Daniel Heath have been ordered forfeited, liquidated and the
15 proceeds turned over to the Receiver.

16 A. Disposition of Assets and Resolution of Estate Claims and Recoveries

17 The receivership estate involved investments in enterprises of questionable
18 value, uncertain collectability and in many instances, involved competing
19 ownership claims and complex legal disputes. Despite these obstacles, the Receiver
20 was able to successfully and cost-effectively liquidate the estate's assets to cash, to
21 the substantial benefit of defrauded investors and other creditors. The Receiver was
22 able to successfully dispose of a number of real property assets in the Big Bear
23 area, including the Northwoods Conference Center and Resort which sold at
24 auction for over \$10.5 million as well as a number of smaller properties which
25 nevertheless in the aggregate sold for over \$1.5 million in value for the estate.
26 During this last expense period, the Receiver completed the liquidation of three real
27 properties in Big Bear and a fractional interest in a unit at The Club at Big Bear for
28 aggregate recoveries of over \$250,000. The Receiver also successfully resolved

1 disputed and contentious claims with Quiznos and sold or disposed of the Quiznos
2 stores that were part of the receivership estate, with aggregate Quiznos-related
3 recoveries exceeding \$9.5 million since the commencement of the case. The
4 Receiver also made successful recoveries of over \$1.6 million from assets
5 liquidated through the Leslee Heath bankruptcy and over \$1.8 million from the
6 estate's interest in the entity Techniglove.

7 B. Claims Procedures

8 On February 28, 2005, the Court in this action conducted a hearing on a
9 motion brought by the Receiver seeking to have administration and supervision of
10 the Schlarmann Interests receivership vested in this Court and on a motion seeking
11 approval of the Receiver's proposed claims filing and allowance procedure (the
12 "Claims Procedures Motion"). The motion regarding the administration of the
13 Schlarmann Interests receivership was granted as reflected in the Order: (1)
14 Approving Stipulation with Chapter 7 Trustee re Administration of Assets,
15 Withdrawal of Reference and Reservation of Rights Over Proceeds; and (2)
16 Authorizing Expansion of Receivership to Include Schlarmann Interests entered
17 March 3, 2005.

18 In February 2005, the Receiver filed a motion for approval of claims filing
19 and allowance procedures. Only one creditor filed opposition to the Claims
20 Procedures Motion, and the Court overruled that objection. The Receiver's
21 proposed claims filing and allowance procedures were granted by Court order
22 entered March 4, 2005 (the "Claims Procedures Order").

23 1. Investor and Non-Investor Claims Allowed

24 Pursuant to the Claims Procedures Order, the Receiver implemented claims
25 filing and allowance procedures. The Receiver determined the claim amount of
26 each investor and the amount owed to non-investor creditors and provided each
27 investor and non-investor creditor claimant with notice of the Receiver's
28 calculation of their claim. Pursuant to the Claims Procedures Order, they were

1 given 30 days to object to the proposed claim amount. Although the Receiver
2 received hundreds of responses to the claims notices, the Receiver eventually
3 successfully resolved all investor objections regarding the amounts of Allowed
4 Investor Claims. There are presently a total of \$117,882,011.50 in Allowed
5 Investor Claims.

6 While most Non-Investor Claims were also resolved without objection,
7 certain Non-Investor Claims were subject to dispute. The Receiver has now fully
8 resolved all disputed Non-Investor Claims. There are a total of \$1,271,932.02 in
9 Allowed Non-Investor Claims, including the claims of those non-investor claimants
10 that were previously disputed that have either been allowed in compromise amounts
11 or have been disallowed pursuant to Court order.

12 2. Request to Modify Troxler Claim Amount

13 In connection with its wind up of the receivership, the Receiver has
14 determined that Rocco Troxler, the principal of Troxler Enterprises, Inc., was
15 granted an allowed investor claim of \$179,700. However, Troxler Enterprises, Inc.,
16 since dissolved, is indebted to one of the receivership entities, PCM, as reflected in
17 the business records of PCM, including a promissory note and security agreement
18 to PCM pre-receivership, the QuickBooks loan balance summary on the PCM
19 books, and consistent with banking records showing funds disbursed to Troxler
20 Enterprises and loan payments made by Troxler Enterprises. The original loan was
21 in the amount of \$140,000, and as of the date of commencement of the receivership,
22 the outstanding principal balance was \$133,557.22. Troxler Enterprises has been
23 dissolved. The Receiver seeks Court approval to reduce the allowed amount of the
24 Troxler claim based on the offsetting liability owed by Troxler Enterprises to PCM
25 under the Troxler Enterprises loan, and specifically seeks to reduce the claim from
26 \$179,700 to \$46,142.78, representing the amount of the original claim less the
27 amount of the outstanding principal balance of the Troxler Enterprises loan.

28

1 C. Administration of Assets Subject to Criminal Action

2 In the Criminal Action, the Court issued an order authorizing the Receiver to
3 liquidate the real property assets of criminal defendant John Heath. Pursuant to an
4 order entered in the Criminal Action, the Receiver liquidated those real estate
5 assets, and the Receiver held the proceeds thereof subject to further order of this
6 Court regarding the distribution of those proceeds. In addition, pursuant to a
7 forfeiture order issued by the Court in the Criminal Action, proceeds of certain
8 bank accounts of Denis O'Brien were also turned over to the Receiver and were
9 held by the Receiver subject to further order of this Court authorizing the
10 distribution of those assets to receivership estate claimants. The order approving
11 the Receiver's fourth distribution entered by the Court on December 16, 2008 also
12 approved the Receiver distributing the proceeds of the John Heath and Denis
13 O'Brien assets pro rata on all Allowed Claims in the estate.

14 A forfeiture hearing concerning one or more IRA accounts of Daniel Heath
15 was originally scheduled to be heard in the Criminal Action in September 2008.
16 After several continuances, the hearing was held on January 23, 2009, and the
17 Court in the Criminal Action signed an order directing the forfeiture of those
18 accounts and the turnover of the funds to the Receiver. The Receiver has recovered
19 and is holding the sum of \$48,792.20 from the liquidated IRA accounts of Daniel
20 Heath, and the Receiver seeks an order of this Court authorizing the Receiver to
21 distribute those funds along with all other receivership assets to the receivership
22 estate claimants.

23 D. Prior Distributions

24 The Receiver has previously made four distributions of estate assets on
25 Allowed Claims pursuant to Court orders approving those distributions. The
26 aggregate amount distributed from the receivership assets to date is
27 \$27,554,271.52 representing approximately 23.1% of the Allowed Investor and
28 Non-Investor Claims against the estate. After taking into account an additional

1 \$48,131.14 recently recovered from P.S. Restaurants, a Schlarmann-related
2 receivership entity, and deducting the remaining unpaid fees and expenses of the
3 Receiver and its counsel and the estimated costs of closing the estate, including
4 estimated fees and expenses, the Receiver anticipates having funds on hand in the
5 estate of approximately \$231,600 with which to make a final distribution to
6 claimants, which will bring total distributions in the case to approximately 23.3% of
7 all Allowed Claims.

8 The Receiver has also estimated the administrative expenses incurred and to
9 be incurred from and after April 30, 2009 through completion of the receivership.
10 The Receiver estimates that he will incur administrative expenses from May 1,
11 2009 through closing of \$58,770.00, including accounting fees to complete tax
12 returns for certain receivership entities, Receiver's fees and expenses, and
13 attorneys' fees and costs, including those to complete this motion and to appear at
14 the hearing and to address the other issues that may arise in winding up the estate.

15 E. Approval of Receiver's Final Report and Final Fee Motion

16 This motion also seeks approval of the Receiver's Final Report and the
17 approval and payment of the fees and costs incurred by the Receiver and his
18 counsel for the period from April 1, 2008 through the conclusion of the case. The
19 Court has previously reviewed fee motions covering fees and costs of the Receiver
20 and the Receiver's professionals from the inception of the case through February
21 28, 2008.

22 During the period since March 1, 2008, the Receiver's principal activities
23 have included completing the sale of remaining real property assets in Big Bear
24 Lake, California pursuant to the Court's order approving the sale of three lots and a
25 fractional interest in a unit at The Club at Big Bear entered March 3, 2008,
26 monitoring activities in the Criminal Action, including coordinating with the
27 Riverside District Attorneys' office to recover and take into the estate the forfeited
28 assets of John Heath, Denis O'Brien and Daniel Heath, and proposing and

1 implementing a fourth distribution on Allowed Claims in the amount of
2 \$1,750,000.00 approved by the Court's order issued December 16, 2008. The
3 Receiver has also prepared his final report and accounting, evaluated the tax and
4 other accounting issues necessary to the wind up of the estate and taken steps to
5 prepare the estate for closing, subject to the Court granting this motion.

6 During this final expense period, the Receiver's counsel appeared at
7 combined hearings on March 3, 2008 on motions which determined and resolved
8 the remaining disputed claims against the estate and for approval of the sale of the
9 remaining properties in Big Bear Lake. The Receiver's counsel assisted and
10 advised the Receiver in completing the documentation and sale of those properties.
11 The Receiver's counsel also appeared at multiple hearings on various disputed
12 claims, and ultimately resolved the disputed claim of Elliot Goldman at a hearing
13 on his claim on March 10, 2008 pursuant to a stipulation reached in Court and
14 approved by the Court.

15 The Receiver's counsel negotiated a settlement of the estate's claim in a
16 bankruptcy estate in Arizona regarding Coast Energy concerning proceeds of assets
17 claimed to be subject to a security interest in favor of one of the receivership
18 entities. The Receiver's counsel prepared, filed and appeared at the hearing on
19 three additional motions during the final expense period, including a motion for
20 approval of the Receiver's settlement with Coast Energy, a motion for approval of
21 the Receiver's fourth distribution and a fee motion. The Receiver's counsel has
22 also assisted the Receiver in evaluating the steps necessary to wind up the estate,
23 including the preparation of this motion.

24 This final expense period covers a 14-month time frame. During this final
25 expense period, from March 1, 2008 through April 30, 2009, the Receiver has
26 incurred Receiver's fees of \$38,387.29 and costs of \$21,905.94. The Receiver has
27 also incurred attorneys' fees of \$27,832.75 and costs of \$3,458.88 for a total of
28 \$31,291.63 for the services of its primary counsel, McKenna Long & Aldridge LLP

1 and the sum of \$552.00 for the services of the Receiver's local counsel, Perkins
2 Coie Brown & Bain in the Coast Energy bankruptcy proceeding.

3 In addition, the Receiver has estimated it will incur Receiver's fees and costs
4 and attorneys' fees and costs in the aggregate of \$58,770.00 from May 1, 2009
5 through the conclusion of the receivership to wind up the estate, including fees and
6 costs for implementing the final distribution, destruction of records, preparing and
7 filing final tax returns, addressing any unclaimed funds and completing any
8 activities necessary or appropriate to wind up the estate. These fees and costs also
9 include fees for counsel's attendance at the hearing on this motion and for advice in
10 connection with the Receiver's wind up of the estate. The Receiver seeks approval
11 of those additional estimated fees and costs and authorization to pay them.

12 F. Final Distribution

13 The Receiver's Final Report estimates that the Receiver will be able to make
14 an additional final distribution in the case in the amount of \$231,600. As in the
15 case of the prior distributions, the Receiver seeks authority to distribute those sums
16 pro rata on all Allowed Investor and Non-Investor Claims. The Receiver also seeks
17 authority to impose an expiration date on the final distribution checks of sixty (60)
18 days from the date of issuance ("stale date") to allow the receivership estate to be
19 timely closed. Based on the results of the fourth distribution, the Receiver would
20 anticipate a minimal number of checks remaining uncashed after the stale date.

21 The Receiver also seeks to address the disposition of any remaining funds in
22 the estate after the final distribution is made. To date, out of the more than \$27.5
23 million in distributions made, there are 32 investors entitled to aggregate
24 distributions to date of approximately \$51,000 whose distribution checks have been
25 uncashed and who the Receiver has been unable to locate. For all distributions paid
26 on Allowed Investor and Non-Investor Claims where the claimant fails to timely
27 cash the final distribution check, or whose prior distributions have been uncashed
28 and who the Receiver has not been able to locate, the Receiver proposes to take the

1 necessary steps under applicable law to escheat those funds to the State of
2 California in the name of the party to whom the distributions are due so that those
3 persons, or potentially their heirs or successors, may claim those funds in the future.
4 To the extent there are any other miscellaneous funds remaining after payment of
5 all remaining administrative expenses and distributions, the Receiver proposes that
6 those funds be turned over to the Department of the Treasury.

7 **II. THE RECEIVER PROPOSES A FINAL DISTRIBUTION ON**
8 **ALLOWED CLAIMS**

9 **A. Courts Have Broad Authority To Adopt Distribution Plans of**
10 **Receivership Assets**

11 “[A] primary purpose of equity receiverships is to promote orderly and
12 efficient administration of the estate by the district court for the benefit of
13 creditors.” S.E.C. v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986); See also, S.E.C.
14 v. Wencke, 783 F.2d 829, 837 (9th Cir. 1986) (“The primary purpose of allowing
15 courts to establish receiverships in securities fraud actions is to prevent further
16 dissipation of the assets of the defrauded investors . . .”). Accordingly, courts are
17 granted “broad powers” and “wide discretion” in supervising and fashioning
18 appropriate relief in an equity receivership to achieve this purpose. S.E.C. v.
19 Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992); S.E.C. v. Hardy, 803 F.2d at 1037;
20 Liberte Capital Group v. Capwill, 229 F. Supp. 2d 799, 802 (N.D. Ohio 2002) *aff’d*,
21 2004 U.S. App. LEXIS 10107 (6th Cir. May 19, 2004); See also, McFarland v.
22 Winnebago South Inc., 863 F. Supp. 1025, 1034 (W.D. Mo. 1994) (“A federal
23 district court presiding over an equity receivership has extremely broad power to
24 supervise the receivership and protect receivership assets.”).

25 With respect to a plan to distribute receivership assets, reasonably
26 expeditious and efficient procedures will generally be upheld so long as they are
27 also fair and equitable. (See, Liberte Capital Group v. Capwill, 229 F. Supp. 2d at
28 804 (“As a court sitting in equity, this Court is governed by a fundamental principle

1 that the method of distribution should be equitable and fair.”); see also, S.E.C. v.
2 Hardy, 803 F.2d at 1038-39 (“the rights of creditors of a receivership must be
3 balanced against the need for expeditious administration of the receivership; a
4 district court in overseeing a receivership must ‘make rules which are practicable
5 as well as equitable’ (*quoting* First Empire Bank-New York v. FDIC, 572 F.2d
6 1361, 1368 (9th Cir.), *cert. denied*, 439 U.S. 919, 58 L. Ed. 2d 265, 99 S. Ct. 293
7 (1978)).

8 **B. The Receiver’s Distribution Plan, Including the Proposed Stale**
9 **Date and Escheat Provisions, Is Fair and Appropriate Under the**
10 **Circumstances**

11 The Court has previously granted the Receiver’s request to distribute
12 receivership funds pro rata on all Allowed Investor Claims and Allowed Non-
13 Investor Claims. The Receiver estimates the final distribution will be in the
14 amount of \$231,600, bringing total distributions in the case to over \$27.7 million
15 (approximately 23.3% recovery on all Allowed Investor and Non-Investor
16 Claims). The Receiver’s pro rata distribution plan treats all creditors of the estate
17 alike by dividing the receivership assets available for distribution among the
18 investor creditors and non-investor creditors according to the Allowed Claims of
19 such creditors.

20 In connection with the Receiver’s distribution, the Receiver also believes the
21 imposition of an expiration date on the final distribution checks of sixty (60) days
22 from the date of issuance (“stale date”) of the distribution checks is necessary and
23 appropriate to allow the receivership estate to be timely closed. Based on the
24 results of the fourth distribution, the Receiver would anticipate that a minimal
25 number of checks will remain uncashed after the stale date, including those to the
26 32 investors who the Receiver has been unable to locate and who have not cashed
27 prior distribution checks totaling approximately \$51,000. Further, by authorizing
28 the Receiver to escheat uncashed distributions to the State of California in the name

1 of the investors to whom they were due, the investors and/or their heirs will have an
2 opportunity to recover those funds in the future.

3 **III. THE RESOLUTION OF THE TROXLER CLAIM AMOUNT IS**
4 **APPROPRIATE**

5 The Receiver's proposed adjustment of the Troxler claim is necessary and
6 appropriate in light of the offsetting amounts due the receivership estate from
7 Troxler. The PCM QuickBooks records, along with the back up banking records,
8 clearly demonstrate that Troxler obtained funds designated as a loan from PCM that
9 were only partially repaid as of the commencement of the receivership, and that the
10 unpaid loan funds due PCM should be offset against the investment claim of
11 Troxler in calculating the correct amount of the net claim on which distributions to
12 Troxler should be paid. The Receiver's counsel has notified Troxler that an
13 adjustment to the claim would be made and has received no response and no
14 returned mail.

15 The Ninth Circuit has approved the use of summary proceedings in the
16 receivership court to resolve claims:

17 The use of such proceedings enables a receiver to
18 consolidate all litigation concerning his receivership in a
19 single district court and before a single district judge, and
20 to avoid formalities that would slow down the resolution
21 of disputes. This promotes judicial efficiency and reduces
22 litigation costs to the receivership. [Citations omitted.]

23 The primary purpose of allowing courts to establish
24 receiverships in securities fraud actions is to prevent
25 further dissipation of assets of the defrauded investors; the
26 use of summary post-judgment proceedings helps to
27 effectuate this.

28 *Securities and Exchange Commission v. Wencke*, 783 F.2d 829, 837 n. 9 (9th Cir.

1 1986), cited with approval in *Securities and Exchange Commission v. Hardy*, 803
2 F. 2d 1034 (9th Cir. 1986).

3 Summary determination of the allowance of the Troxler claim as provided
4 herein is appropriate.

5 **IV. THE RELIEF SOUGHT IS APPROPRIATE TO ALLOW THE**
6 **RECEIVER TO WIND UP THE ESTATE FORTHWITH**

7 Court approval of the Receiver's actions and requests is consistent with
8 federal receivership practice as required by Federal Rule of Civil Procedure,
9 Rule 66. *See*, 2 Clark on Receivers, § 383.1 (3d ed. 1959). The Court has wide
10 latitude in supervising the Receiver and may provide for the administration of the
11 receivership as it deems appropriate. 13 *Moore's Federal Practice*, § 66.06[4][a],
12 p. 66-22 (Matthew Bender 3d ed. Rev. 2008).

13 The relief sought in this motion will promote the orderly and prompt wind up
14 of the receivership estate in an expeditious and cost-effective manner. The relief
15 sought is customary and appropriate in closing a receivership estate, discharging the
16 receiver and exonerating the Receiver's bond. The fees and expenses sought by the
17 Receiver, both those previously authorized and paid and those remaining unpaid,
18 are reasonable under the circumstances given the services rendered, the scope of the
19 case, and the excellent and cost-effective results obtained which will enable the
20 Receiver to return to the holders of Allowed Claims over \$27.7 million, a recover
21 of over 23.3% on all Allowed Claims.

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1 **V. CONCLUSION**

2 Based on the foregoing, the Receiver respectfully requests that the Court
3 grant relief as sought herein.

4
5 DATED: July 1, 2009

McKENNA LONG & ALDRIDGE LLP
GARY OWEN CARIS
LESLEY ANNE HAWES

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8 By: /s/ Gary Owen Caris
9 GARY OWEN CARIS
10 Attorneys for Permanent Receiver,
11 ROBB EVANS
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DECLARATION OF GARY OWEN CARIS

I, Gary Owen Caris, declare:

1. I am an attorney at law duly licensed to practice before all courts of the State of California and the United States District Court for the Central District of California, and a partner of McKenna Long & Aldridge LLP (“McKenna Firm”), the attorneys for Robb Evans & Associates LLC (“Receiver”). I have been the attorney primarily responsible for assisting the Receiver since his appointment as temporary receiver in this action. If called upon to testify as to the facts set forth in this declaration, I could and would testify competently thereto as the facts are personally known to me to be true.

2. Attached hereto as Exhibit 1 are billing summaries reflecting the services rendered, time spent and costs incurred by the McKenna Firm pertaining to this matter for the period from March 1, 2008 through April 30, 2009, with the descriptions redacted where appropriate to preserve the attorney-client privilege and attorney-work-product privileges or to otherwise protect the Receiver and the estate from disclosure of confidential, tactical, or strategic information. Attorneys’ fees incurred by the McKenna Firm during this time period total \$27,832.75, and costs incurred in that period total \$3,458.88, for a total of \$31,291.63.

3. During the current expense period covering 14 months of activities, the McKenna Firm prepared, filed and attended hearings on multiple motions, as described herein.

4. On March 3, 2008, shortly after this expense period commenced, the McKenna Firm appeared at combined hearings on motions which determined and resolved the remaining disputed claims against the estate and for approval of the sale of the remaining properties in Big Bear Lake. My firm assisted and advised the Receiver in completing the documentation and sale of those properties. I also appeared at multiple hearings on various disputed claims, and ultimately resolved

1 the disputed claim of Elliot Goldman at a hearing on his claim on March 10, 2008
2 pursuant to a stipulation reached in Court and approved by the Court.

3 5. I assisted the Receiver in negotiating a settlement of the estate's claim
4 in a bankruptcy estate in Arizona regarding Coast Energy concerning proceeds of
5 assets claimed to be subject to a security interest in favor of one of the receivership
6 entities. My firm prepared, filed and appeared at hearings on three additional
7 motions during the final expense period, including a motion for approval of the
8 Receiver's settlement with Coast Energy, a motion for approval of the Receiver's
9 fourth distribution and a fee motion. The McKenna Firm has also assisted the
10 Receiver in evaluating the steps necessary to wind up the estate, including the
11 preparation of this motion.

12 6. During this final expense period, in addition to the fees and expenses
13 incurred to the McKenna firm, the Receiver has incurred attorneys' fees and costs
14 to the firm of Perkins Coie Brown & Bain, the Receiver's local counsel in the Coast
15 Energy bankruptcy proceeding, in the sum of \$552.00 in connection with the
16 settlement of the Coast Energy claim, which resulted in a payment of \$67,073.27 to
17 the receivership estate, and the approval of the settlement with the Chapter 7
18 trustee.

19 7. In addition, I estimate the Receiver will incur attorneys' fees and costs
20 of \$11,700.00 from May 1, 2009 through the conclusion of the receivership in
21 connection with the wind up of the estate, including fees for preparation of this
22 motion and counsel's attendance at the hearing on this motion, and for advice in
23 connection with the Receiver's wind up of the estate.

24 8. In connection with the wind up of the receivership estate, the
25 McKenna Firm directed a letter to Rocco Troxler regarding a change in the allowed
26 amount of the investment claim asserted against the receivership estate based on the
27 amount of an unpaid outstanding loan owed to PCM. Attached hereto as Exhibit 2
28 is a true and correct copy of the letter sent to Troxler to address the adjustment in

1 the claim amount granted. My firm did not receive a response to the letter, Exhibit
2 2, and the letter was not returned by the post office.

3 9. I am familiar with the methods and procedures used by the McKenna
4 Firm to create, record and maintain billing records for the firm's clients. The billing
5 summaries attached hereto are prepared from computerized time records prepared
6 contemporaneously with the services rendered by each attorney and paralegal
7 billing time to this matter. These computerized records are prepared in the ordinary
8 course of business by the attorneys and paralegals employed by the firm who have a
9 business duty to accurately record their time spent and services rendered on the
10 matters on which they perform work. The time records are transferred into a
11 computerized billing program which generates monthly invoices under the
12 supervision of the firms' accounting departments. Based upon my experience, I
13 believe the McKenna Firm's methods and procedures for recording and accounting
14 for time and services for its clients are reliable and accurate.

15 10. I have more than 29 years' experience as a business and commercial
16 litigator and also have extensive experience as a bankruptcy attorney representing
17 creditors in Chapter 11 and Chapter 7 bankruptcy cases. For more than ten years, I
18 have also specialized in representing receivers in federal equity receiverships. I am
19 familiar with the billing rates and practices of firms in the Los Angeles area
20 providing comparable services, and I believe my firm's rates and the amount
21 incurred by the Receiver for the services rendered during this expense period are
22 reasonable and appropriate based on the nature of the services rendered, the quality
23 and amount of services provided, the complexity of the issues involved and other
24 factors under the circumstances, including the results obtained.

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1 I declare under penalty of perjury that the foregoing is true and correct and
2 that this declaration was executed this 1st day of July 2009, at Los Angeles,
3 California.

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/s/ Gary Owen Caris

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GARY OWEN CARIS

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1 GARY OWEN CARIS (SBN 088918)
gcaris@mckennalong.com
2 LESLEY ANNE HAWES (SBN 117101)
lhawes@mckennalong.com
3 MCKENNA LONG & ALDRIDGE LLP
444 South Flower Street, 8th Floor
4 Los Angeles, CA 90071-2901
Telephone: (213) 688-1000
5 Facsimile: (213) 243-6330

6 Attorneys for Permanent Receiver,
7 **ROBB EVANS**

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 v.

14 D.W. HEATH & ASSOCIATES, INC.,
etc., et al.,

15 Defendants.
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CASE NO. CV 04-02949 JFW (Ex)

**DECLARATION OF ROBB EVANS
IN SUPPORT OF MOTION BY
RECEIVER FOR ORDER (1)
APPROVING FINAL REPORT AND
ACCOUNTING; (2) APPROVING
MODIFIED TREATMENT OF
TROXLER ENTERPRISES CLAIM;
(3) APPROVING FINAL
DISTRIBUTION OF RECEIVERSHIP
ASSETS; (4) APPROVING
RECEIVER'S AND ATTORNEYS'
FEES AND EXPENSES FROM
MARCH 1, 2008 THROUGH
CLOSING; (5) DISCHARGING
RECEIVER; (6) RELIEVING
RECEIVER OF ALL DUTIES AND
LIABILITIES; (7) EXONERATING
RECEIVER'S BOND; (8)
AUTHORIZING ABANDONMENT
AND DESTRUCTION OF RECORDS
AND WIND-UP OF RECEIVERSHIP
ESTATE**

Date: July 27, 2009
Time: 1:30 p.m.
Place: Courtroom 16
312 N. Spring Street
Los Angeles, CA

1 I, Robb Evans, declare:

2 1. I have been appointed as permanent receiver of D.W. Heath &
3 Associates, inc., Private Capital Management, Inc., Private Collateral Management,
4 Inc. and PCM Fixed Income Fund I, LLC and their subsidiaries and affiliates
5 (collectively, the "Heath Receivership Defendants") and as Receiver over the
6 Schlarmann Interests ("Receiver") and am a principal in Robb Evans & Associates
7 LLC. I have personal knowledge of the matters set forth in this declaration, and if I
8 were called upon to testify as to these matters, I could and would competently
9 testify based upon my personal knowledge.

10 2. I was initially appointed as temporary receiver in this matter pursuant
11 to this Court's Stipulation and Order Appointing Robb Evans Temporary Receiver
12 entered May 4, 2004. Thereafter, I was appointed as permanent receiver pursuant
13 to the Stipulation and Order Appointing a Permanent Receiver entered May 19,
14 2004.

15 3. On July 2, 2004, the Riverside County District Attorney initiated a
16 criminal action against Heath, O'Brien, Heath's father, John William Heath, and
17 Larre Jaye Schlarmann ("Schlarmann"), in the action entitled People of the State of
18 California v. Daniel William Heath, et al., Case No. RIF 117775 pending in the
19 Superior Court of California, County of Riverside ("Criminal Action"). The claims
20 asserted in the Criminal Action are subject to the state "Aggravated White Collar
21 Crime Enhancement" provisions of the California Penal Code, pursuant to which
22 the District Attorneys' office has sought and obtained a temporary restraining order
23 prohibiting the disposition or transfer of assets by any of the criminal defendants.
24 In addition, on July 21, 2004, the Riverside Superior Court issued its Order
25 Appointing Robb Evans as Receiver of the Schlarmann Interests Pursuant to Penal
26 Code section 186.11 ("July 21 Receivership Order"). The July 21, 2004
27 Receivership Order was subsequently amended by order entered November 19,
28 2004 in the Criminal Action to expand the scope of assets subject to the

1 receivership to include certain real property containing avocado groves located in
2 Bonsall, California (“Amended Schlarmann Order”). The July 21, 2004
3 Receivership Order and the Amended Schlarmann Order are referred to collectively
4 herein as the “Schlarmann Receivership Order.” Pursuant to the Schlarmann
5 Receivership Order, I was appointed Receiver over all of the Quizno’s Entities and
6 the Hotel Entities, as those terms are defined in the Schlarmann Receivership
7 Order, and the Bonsall property. The Court in the Criminal Action has also ordered
8 that the Receiver liquidate real property assets of John Heath.

9 4. I along with other members of Robb Evans & Associates LLC and my
10 staff participated in the preparation of the Receiver’s Reports of Activities
11 previously filed with the Court and approved by Court orders in this case, including
12 the Receiver’s Report of Activities for the Period of May 15, 2004 Through July 9,
13 2004 filed July 14, 2004 and the Receiver’s Report of Activities for the Period of
14 July 12, 2004 Through December 31, 2004 filed January 21, 2005. The reports
15 describe the lack of financial basis for the transactions and investments solicited
16 from the victims of the investment fraud perpetrated by the defendants and further
17 support the conclusion that funds paid to earlier investors as “interests” or “profits”
18 were paid with funds solicited from later investors. The findings in the reports
19 indicate that Heath Receivership Defendants operated a fraudulent Ponzi-type
20 investment scheme and that the investment entities were insolvent at all times as a
21 result, with obligations owed by the entities exceeding the assets available to repay
22 them. Judgments have been entered against the Receivership Defendants as well
23 as against Heath in this civil action in the principal amount of \$109,334,158.

24 5. Trial in the Criminal Action has also been completed, with all
25 defendants found guilty of numerous counts of fraud, elder abuse and other crimes.
26 All defendants have now been sentenced.

27 6 On February 28, 2005, the Court in this action conducted a hearing on
28 a motion brought by the Receiver seeking to have administration and supervision of

1 the Schlarmann Interests receivership vested in this Court and on a motion seeking
2 approval of the Receiver's proposed claims filing and allowance procedure (the
3 "Claims Procedures Motion"). The motion regarding the administration of the
4 Schlarmann Interests receivership was granted as reflected in the Order: (1)
5 Approving Stipulation with Chapter 7 Trustee re Administration of Assets,
6 Withdrawal of Reference and Reservation of Rights Over Proceeds; and (2)
7 Authorizing Expansion of Receivership to Include Schlarmann Interests entered
8 March 3, 2005.

9 7. In February 2005, the Receiver filed a motion for approval of claims
10 filing and allowance procedures. Only one creditor filed opposition to the Claims
11 Procedures Motion. That creditor's objection was overruled, and the Receiver's
12 proposed claims filing and allowance procedures were granted by Court order
13 entered March 4, 2005 (the "Claims Procedures Order").

14 8. Pursuant to the Claims Procedures Order, the Receiver has
15 implemented claims filing and allowance procedures. The Receiver determined the
16 claim amount of each investor and the amount owed to non-investor creditors and
17 provided each investor and non-investor creditor claimant with notice of the
18 Receiver's calculation of their claim. Pursuant to the Claims Procedures Order,
19 creditors were given 30 days to object to the proposed claim amount. Although my
20 staff and I received hundreds of responses to the claims notices, we eventually
21 successfully resolved all but two investor objections regarding the amounts of
22 Allowed Investor Claims, and several Non-Investor Claims were not resolved. The
23 claims of the two investor creditors who asserted objections to the Receiver's
24 proposed allowance of their claims were later resolved, and there are a total of
25 \$117,882,011.50 in Allowed Investor Claims.

26 9. While most Non-Investor Claims were also resolved without objection,
27 certain Non-Investor Claims were subject to dispute. The Receiver has now fully
28 resolved all disputed Non-Investor Claims. There are a total of \$1,271,932.02 in

1 Allowed Non-Investor Claims, including the claims of those non-investor claimants
2 that were previously disputed that have either been allowed in compromise amounts
3 or have been disallowed pursuant to Court order.

4 10. In the Criminal Action, the Court issued an order authorizing the
5 Receiver to liquidate the real property assets of criminal defendant John Heath.
6 Pursuant to order of Court in the Criminal Action, I have liquidated those real estate
7 assets, and held the proceeds thereof subject to further order of this Court regarding
8 the distribution of those proceeds. In addition, pursuant to a forfeiture order issued
9 by the Court in the Criminal Action, proceeds of certain bank accounts of Denis
10 O'Brien were also turned over to the Receiver and were held by the Receiver
11 subject to further order of this Court authorizing the distribution of those assets to
12 receivership estate claimants. The order approving the Receiver's fourth
13 distribution entered by the Court on December 16, 2008 also approved the Receiver
14 distributing the proceeds of the John Heath and Denis O'Brien assets pro rata on all
15 Allowed Claims in the estate.

16 11. A forfeiture hearing concerning one or more IRA accounts of Daniel
17 Heath was originally scheduled to be heard in the Criminal Action in September
18 2008. After several continuances, the hearing was held on January 23, 2009, and
19 the Court in the Criminal Action signed an order directing the forfeiture of those
20 accounts and the turnover of the funds to the Receiver. I have recovered and am
21 holding the sum of \$48,792.20 from the liquidated IRA accounts of Daniel Heath,
22 and I seek an order of this Court authorizing me to distribute those funds along with
23 all other receivership assets to the receivership estate claimants.

24 12. The Receiver has prepared a final report and accounting ("Final Report
25 and Accounting") which are attached hereto as Exhibits 1 and 2, respectively. The
26 Final Report summarizes events in the receivership since the last report and
27 addresses certain issues regarding the wind up of the receivership estate. The
28 Accounting entitled Receivership Collections and Administrative Expense by

1 Month sets forth the income, receipts, disbursements and expenses of the estate
2 from the inception of the receivership through the estimated expenses for closing.
3 The Accounting is broken down into two sections, one with monthly summaries for
4 March 2008 through December 2008 and one with monthly summaries from
5 January 2009 through the closing.

6 13. In connection with the wind up of the estate, the Receiver has
7 determined that Rocco Troxler, the principal of Troxler Enterprises, Inc., was
8 granted an allowed investor claim of \$179,700. However, Troxler, through his
9 company Troxler Enterprises, is indebted to one of the receivership entities, PCM,
10 as reflected in the business records of PCM. Attached hereto as Exhibit 2 is a true
11 and correct copy of the QuickBooks loan balance summary on the PCM books, and
12 attached hereto collectively as Exhibit 3 are true and correct copies of banking
13 records showing disbursements by PCM of the \$140,000 in loan funds. Attached
14 hereto collectively as Exhibit 4 are true and correct copies of the payments made by
15 Troxler on the loan. Attached hereto collectively as Exhibit 5 is information
16 demonstrating that Troxler Enterprises, Inc. has been dissolved. As reflected in
17 these documents, the original loan by PCM was in the amount of \$140,000, and as
18 of the date of commencement of the receivership, the outstanding principal balance
19 was \$133,557.22. I seek Court approval to reduce the allowed amount of the
20 Troxler claim based on the offsetting liability owed by Troxler to PCM under the
21 Troxler loan, and specifically seeks to reduce the claim from \$179,700 to
22 \$46,142.78, representing the amount of the original claim less the amount of the
23 outstanding principal balance of the Troxler loan reflected in the QuickBooks loan
24 summary. There is a notation on a PCM balance sheet included in the receivership
25 records that there was a separate additional amount of \$1,487.90 owed by Troxler
26 to PCM, but I propose to use the lower debt figure based on the PCM QuickBooks
27 loan balance, which benefits Troxler by providing a lower offset and higher net
28 claim amount.

1 14. The Receiver has previously made four distributions of estate assets
2 on Allowed Claims pursuant to Court orders approving those distributions. The
3 aggregate amount distributed from the receivership assets to date is
4 \$27,554,271.52 representing approximately 23.1% of the Allowed Investor and
5 Non-Investor Claims against the estate. After taking into account an additional
6 \$48,131.14 recently recovered from P.S. Restaurants, a Schlarmann-related
7 receivership entity, and deducting the remaining unpaid fees and expenses of the
8 Receiver and its counsel and the estimated costs of closing the estate, including
9 estimated fees and expenses, I anticipate having funds on hand in the estate of
10 approximately \$231,600 with which to make a final distribution to claimants, which
11 will bring total distributions in the case to approximately 23.3% of all Allowed
12 Claims.

13 15. As set forth in the Accounting, Exhibit 2, the Receiver has also
14 estimated the administrative expenses incurred and to be incurred from and after
15 April 30, 2009 through completion of the receivership. I estimate that I will incur
16 administrative expenses from May 1, 2009 through closing of \$58,770.00,
17 including accounting fees to complete tax returns for certain receivership entities,
18 Receiver's fees and expenses, and attorneys' fees and costs, including those to
19 complete this motion and to appear at the hearing and to address the other issues
20 that may arise in winding up the estate. The Receiver's estimated fees and
21 expenses also include fees and costs for implementing the final distribution,
22 destroying records, and addressing any unclaimed funds and completing any
23 activities necessary or appropriate to wind up the estate.

24 16. Attached hereto collectively as Exhibit 6 are detailed time records for
25 the Receiver and the Receiver's staff setting forth their activities for the period from
26 March 1, 2008 through April 30, 2009. During the period since March 1, 2008, the
27 Receiver's principal activities have included completing the sale of remaining real
28 property assets in Big Bear Lake, California pursuant to the Court's order

1 approving the sale of three lots and a fractional interest in a unit at The Club at Big
2 Bear entered March 3, 2008, monitoring activities in the Criminal Action, including
3 coordinating with the Riverside District Attorneys' office to recover and take into
4 the estate the forfeited assets of John Heath, Denis O'Brien and Daniel Heath, and
5 proposing and implementing a fourth distribution on Allowed Claims in the amount
6 of \$1,750,000.00 approved by the Court's order issued December 16, 2008. The
7 Receiver has also prepared his Final Report and Accounting, evaluated the tax and
8 other accounting issues necessary to the wind up of the estate and taken steps to
9 prepare the estate for closing, subject to the Court granting this motion.

10 17. This final expense period covers a 14-month time frame. During this
11 final expense period, from March 1, 2008 through April 30, 2009, the Receiver has
12 incurred Receiver's fees of \$38,387.29 and costs of \$21,905.94. The Receiver has
13 also incurred attorneys' fees of \$27,832.75 and costs of \$3,458.88 for a total of
14 \$31,291.63 for the services of its primary counsel, McKenna Long & Aldridge LLP
15 and the sum of \$552.00 for the services of the Receiver's local counsel, Perkins
16 Coie Brown & Bain in the Coast Energy bankruptcy proceeding.

17 18. The Receiver's Final Report and Accounting estimates that the
18 Receiver will be able to make an additional final distribution in the case in the
19 amount of \$231,600. As in the case of the prior distributions, the Receiver seeks
20 authority to distribute those sums pro rata on all Allowed Investor and Non-Investor
21 Claims. The Receiver also seeks authority to impose an expiration date on the final
22 distribution checks of sixty (60) days from the date of issuance ("stale date") to
23 allow the receivership estate to be timely closed. Based on the results of the fourth
24 distribution, I would anticipate that a minimal number of checks will remain
25 uncashed after the stale date. Out of the more than \$27.5 million in distributions
26 made to date, there are 32 investors entitled to aggregate distributions to date of
27 approximately \$51,000 whose distribution checks have been uncashed and who the
28 Receiver has been unable to locate. For all distributions paid on Allowed Investor

1 and Non-Investor Claims where the claimant fails to timely cash the final
2 distribution check, or whose prior distributions have been uncashed and who the
3 Receiver has not been able to locate, I propose to take the necessary steps under
4 applicable law to escheat those funds to the State of California in the name of the
5 party to whom the distributions are due so that those persons, or potentially their
6 heirs or successors, may claim those funds in the future. To the extent there are any
7 other miscellaneous funds remaining after payment of all remaining administrative
8 expenses and distributions, I propose that those funds be turned over to the
9 Department of the Treasury.

10 I declare under penalty of perjury that the foregoing is true and correct and
11 that this declaration was executed on this 30th day of July 2009 at Sun Valley,
12 California.

13
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15 _____
16 ROBB EVANS